No. 3678

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United States Circuit Court of Appeals

For the Ninth Circuit

JOHN BASICH
Plaintiff in Error
vs.
THE UNITED STATES OF AMERICA
Defendant in Error

Brief for Plaintiff in Error

Upon Writ of Error to the District Court of the United States for the District of Oregon.

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STATEMENT OF THE CASE.

The defendant (plaintiff in error here) was indicted in three counts, all involving alleged violations of the Prohibition Act of October 28, 1919, commonly known as the Volstead Act. Count I alleges that the defendant, on August 4, 1920, at Newberg, Oregon, maintained a nuisance, to-wit: a building where intoxicating liquor was being manu-

factured and kept. Count II alleges that the defendant on August 4, 1920, at Newberg, Oregon, manufactured intoxicating liquor. Count III alleges that the defendant on August 1, 1920, transported intoxicating liquors in a Republic automobile truck. The jury found him guilty on the first two counts and not guilty on the third count. The Court thereupon imposed a sentence of one year on the first count and six months on the second count of the indictment, the said terms of imprisonment being the maximum sentences allowed by law for the offenses embraced by the said counts in the indictment.

From the judgment entered thereon the defendant has prosecuted this writ, urging as the principal ground for reversal the introduction of evidence on the part of the government tending to prove the commission by the defendant of a separate and distinct offense unrelated to that for which he was on trial. It is claimed by the defendant that this evidence was clearly incompetent and was highly prejudicial, particularly in view of the fact that there was then pending against the defendant a separate indictment covering the identical offense, which was permitted to be introduced as aiding the Government's case in this trial.

According to the evidence in this case, as appears from the bill of exceptions, positive evidence was introduced through one Bob Ugan, a witness for the Government, to the effect that he had been hired by

the defendant to build a cabin on a place known as the Hall Ranch at Newberg and to manufacture intoxicating liquor therein; that the witness completed the building of said cabin about May 10th or May 15th, 1920, and that he was engaged in manufacturing intoxicating liquor thereat on August 4, 1920, at which time the arrest was made. For the purpose of corroborating the testimony of this self-confessed accomplice, other witnesses on behalf of the Government testified that the defendant had been seen to go to the Hall Ranch and to the cabin where the liquor was being manufactured.

Thereupon the Government called as a witness, one O. A. Powell, a police officer of the City of Portland, who was allowed by the Court to testify over the strenuous objection of the defendant's counsel that he had arrested the defendant on June 28, 1920, at the Oak Hotel, Portland, at which time the defendant had in his possession a suit case, containing 24 pints of moonshine liquor, which liquor was transported thereto by the defendant in a Buick automobile. It will be noted that the offense of transporting and having in his possession these 24 pints of liquor on June 28, 1920, for which the defendant was arrested at that time, was made the subject of a separate indictment against the defendant, which indictment was then and there pending and was to come on for trial immediately following the completion of the trial involving the alleged offense at Newberg. It is in permitting the

introduction in this trial of the testimony involving the alleged offense at Portland that the defendant claims the Court erred.

SPECIFICATION OF ERRORS.

I.

That the Court erred in overruling the objection of counsel for the defendant to the following testimony given by O. A. Powell, a witness on behalf of the Government:

Q. Do you know the defendant in this case, John Basich?

A. Yes, sir, I do.

Q. How long have you known him?

A. Oh, I have known him since the arrest; in June anyway.

* * * * * *

Q. When in June did you see John Basich?

A. I saw him on the 28th day of June.

Q. Where?

A. Well, I arrested him.

Q. Where?

A. At the Oak Hotel.

Q. What city?

A. Portland.

Q. What, if any, intoxicating liquor did he have in his possession at that time?

A. He had a suit case containing twenty-four pints of moonshine at that time.

* * * * * *

Q. What kind of automobile was John Basich driving that morning.

A. Driving a Buich.

Q. What license number, if any, did it bear?

A. Oregon state licnese number 28843.

II.

That the Court erred in overruling the motion of counsel for the defendant to take from the jury and to strike out the testimony of O. A. Powell tending to show the commission of an offense by the defendant not covered by the indictment herein, that is to say, testimony relating to the possession and transportation of liquor by the defendant in the City of Portland on June 28, 1920, for which offense a separate indictment was then and there pending against said defendant and for which he was not then on trial.

III.

That Count I of the indictment does not state facts sufficient to constitute an offense against the laws of the United States or to apprise the defendant of the precise nature of the charge.

IV.

That Count II of the indictment does not state facts sufficient to constitute an offense against the laws of the United States or to apprise the defendant of the precise nature of the charge.

V.

That the Court erred in entering an order committing the defendant to twelve months in the county

jail on Count I of the indictment, and to six months in the county jail on Count II of the indictment.

VI.

That the judgment and sentence of the Court is contrary to law.

ARGUMENT.

The general rule of evidence applicable to criminal trials is, that evidence tending to show the commission by the accused of another independent crime, even of the same kind as that for which he is on trial, is inadmissible for the purpose of aiding the proof that he is guilty of the crime charged. (16 C. J. 586); (Bishop's New Crim. Proc., 2nd Ed., 961); (Zoline on Fed. Crim. Law & Proc., Vol. 1, p. 296). The law excludes this evidence upon grounds of public policy, to prevent the multiplication of issues in a case and to protect a party from the injustice of being called upon without notice to explain the acts of his life not shown to be connected with the offense with which he is charged. (16 C. J. 586.)

It is easy to see how such evidence may prejudice the jury against the defendant—may, in fact, lead to his conviction of the offense with which he stands charged, because the jury may believe that he is at least guilty of the other offense. In brief, the law does not allow one crime to be proved to

raise a probability that another has been committed. This rule, so universally established in all English-speaking lands, is rooted in that jealous regard for the liberty of the individual which has distinguished our jurisprudence from all others, at least from the birth of Magna Charta. It is the product of that same humane and enlightened public spirit which, speaking through our common law, has decreed that every person charged with the commission of a crime shall be protected by the presumption of innocence until he has been proved guilty beyond a reasonable doubt.

> "This principle has long been accepted in our law—that the doing of one act is, in itself, no evidence that the same or a like act was again done by the defendant has been so often judicially repeated that it is a commonplace." (Wigmore on Evidence, Sec. 192.)

In *People v. Sharp,* 107 N. Y. 427, 14 N. E. 319, it was said:

> "The general rule is that when a man is put upon trial for one offense, he is to be convicted, if at all, by evidence which shows that he is guilty of that offense alone, and that, under ordinary circumstances, proof of his guilt of one or a score of other offenses in his lifetime is wholly excluded."

In the case of *Coleman v. People,* 55 N. Y. 81, the rule is laid down as follows:

> "The general rule is against receiving evidence of another offense. A person cannot be convicted of one offense upon proof that he committed another, however persuasive in a

moral point of view such evidence may be. It would be easier to believe a person guilty of one crime if it was known that he had committed another of a similar character, or, indeed, of any character; but the injustice of such a rule in courts of justice is apparent. It would lead to convictions, upon the particular charge made, by proof of other acts in no way connected with it, and to uniting evidence of several offenses to produce conviction for a single one."

In the case of *People v. Shea,* 147 N. Y. 78, 41 N. E. 505, the rule is thus stated:

"The impropriety of giving evidence showing that the accused had been guilty of other crimes, merely for the purpose of thereby inferring his guilt of the crime for which he is on trial, may be said to have been assumed and consistently maintained by the English courts ever since the common law has itself been in existence. Two antagonistic methods for the judicial investigation of crime and the conduct of criminal trials have existed for many years. One of these methods favors this kind of evidence in order that the tribunal which is engaged in the trial of the accused may have the benefit of the light to be derived from a record of his whole past life, his tendencies, his nature, his associates, his practices, and in fine all the facts which go to make up the life of a human being. This is the method which is pursued in France, and it is claimed that entire justice is more apt to be done where such a course is pursued than where it is omitted. The common law of England, however, had adopted another, and, so far as the party accused is concerned, a much more merciful, doctrine. By that law the criminal is to be presumed innocent until his guilt is made to appear beyond a reasonable

doubt to a jury of 12 men. In order to prove his guilt it is not permitted to show his former character or to prove his guilt of other crimes, merely for the purpose of raising a presumption that he who would commit them would be more apt to commit the crime in question."

In the case of *People v. Grutz,* 212 N. Y. 72, Ann. Cas. 1915D, it is stated as follows:

> "It is one of the distinguishing features of our common-law system of jurisprudence that, as a general rule, a person who is on trial charged with a particular crime may not be shown to be guilty thereof by evidence showing that he has committed other crimes. The reason for this general rule has been stated by this Court in a number of decisions, but never more tersely and clearly than by Judge Peckham in *People v. Shea,* 147 N. Y. 78, 99, 41 N. E. 505 supra."

In the case of *Com. v. Jackson,* 132 Mass. 16, 44 Am. Rep. 299, it is thus stated:

> "The objection to the admission of evidence as to other transactions, whether amounting to indictable crimes or not, are very apparent. Such evidence compels the defendant to meet charges of which the indictment gives him no information, confuses him in his defense, raises a variety of issues, and thus diverts the attention of the jury from the one immediately before it, and, by showing the defendant to have been a knave on other occasions, creates a prejudice which may cause injustice to be done him."

In the case of *Shaffner v. Com,* 72 Pac. 60, 13 Am. Rep. 649, the rule is thus stated:

> "It is a general rule that a distinct crime unconnected with that laid in the indictment

cannot be given in evidence against a prisoner. It is not proper to raise a presumption of guilt on the ground that, having committed one crime, the depravity it exhibits makes it likely he would commit another. Logically, the commission of an independent offense is not proof in itself of the commission of another crime. Yet it cannot be said to be without influence on the mind, for certainly if one be shown to be guilty of another crime equally heinous, it will prompt a more ready belief that he might have committed the one with which he is charged. It therefore predisposes the mind of the juror to believe the prisoner guilty."

In the case of *State v. Alston,* 94 N. C. 930, it is stated:

"As a general rule, it is not admissible on a prosecution for one offense to prove that the defendant had before committed another offense. To this there are exceptions but the offense must be brought home to the defendant."

In the case of *State v. Lapage,* 57 N. H. 245, 24 Am. Rep. 69, the Court in its opinion among other things stated, as follows:

"It is a maxim of our law, that every man is presumed to be innocent until he is proved to be guilty. It is characteristic of the humanity of all the English speaking peoples, that you cannot blacken the character of a party who is on trial for an alleged crime. Prisoners ordinarily come before the Court and the jury under manifest disadvantages. The very fact that a man is charged with a crime is sufficient to create in many minds a belief that he is guilty. It is quite consistent with that fairness of trial to which every man is entitled, that the jury should not be prejudiced against him by any evidence

except what relates to the issue; above all should it not be permitted to blacken his character, to show that he is worthless, to lighten the sense of responsibility which rests upon the jury, by showing that he is not worthy of painstaking and care."

* * * * * *

"If it were the law, that everything which has a natural tendency to lead the mind toward a conclusion that a person charged with crime is guilty must be admitted in evidence against him on the trial of that charge, the argument for the State would doubtless be hard to answer. If I know a man has once been false, I cannot after that believe in his truth as I did before. If I know he has committed the crime of perjury once, I more readily believe he will commit the same awful crime again, and I cannot accord the same trust and confidence to his statements under oath that I otherwise should. Yet, does the law permit the credit of a witness to be impeached by showing individual acts of falsehood? We do not and we cannot believe a known liar the same as we believe a known man of truth. Why, then, ought not evidence showing that a witness has lied on any particular occasion to be received, in order that we may weigh the credit of his testimony by rules derived from human nature and experience, such as we naturally and instinctively apply in the other affairs of life?

"Suppose the general character of one charge with crime is infamous and degraded to the last degree; that his life has been nothing but a succession of crimes of the most atrocious and revolting sort; does not the knowledge of all this inevitably carry the mind in the direction of a conclusion that he has added the particular crime for which he is being tried to the list of those that have gone before? Why, then,

should not the prosecutor be permitted to show facts which tend so naturally to produce a conviction of his guilt? The answer to all these questions is plain and decisive. The law is otherwise. It is the law, that the prisoner shall be presumed innocent until his guilt is proved; it is the law, that his bad character shall not be shown by the State until he has put that matter in issue by attempting to show good character for himself; it is the law, that the credit of a witness shall not be impeached by showing specific instances of falsehood against him; and it is the law, that evidence of the commission of one crime shall not be received to show the commission of another when there is no connection between the two. Whether the law in this respect is wise or unwise, whether it accords with human reason and experience, whether it affords too great protection to the criminal or too little to the community, are not questions with which we have to do. It has been thought, that to confront a man on trial for a crime that involves no more than his liberty and property with every act of his former life, and require him to purge himself from the suspicion of guilt which may be raised by the testimony of witnesses to individual instances of alleged wrongdoing, would be not only oppressive and unfair, but arbitrary and inhuman.

The rules of the common law in reference to the detection and punishment of crime, which are the growth of ages, and embody the practical wisdom and experience of many great and learned men, carry upon every page unmistakable evidence that they were devised as well to shield the innocent as to punish the guilty. Throughout they recognize the fact that innocent men may be accused of crime. A highly wrought condition of the public mind, the popular horror and indignation that arise upon the

commission of a dreadful crime, are not favorable to the calm and dispassionate application of a just and humane law. They do not always leave the vision clear. But popular clamor, however loud, cannot be permitted to invade this place without imperiling the most sacred rights of the innocent as well as the guilty."

In the case of *People v. King,* 114 N. E. 601, 276 Ill. 138, the Court in its opinion said:

"The general rule under our system of jurisprudence is that evidence of a distinct substantive offense cannot be admitted in support of another offense. This is but the reiteration of a still more general rule, that in all cases, civil or criminal, the evidence must be confined to the point in issue. This rule excludes all evidence of collateral facts or those which are incapable of affording any reasonable presumption or inference as to the principal fact or matter in dispute, the reason being that such evidence tends to draw away the minds of the jurors from the point in issue and arouse their prejudice. Moreover, the adverse party would not be given notice by the charges in the indictment as to what the evidence was to be as such collateral crimes."

As stated in the case of *State v. Hyde,* 234 Mo. 200, 136 S. W. 316:

"This rule rests upon two grounds—(1) the impropriety of inferring from the commission of one crime that the defendant is guilty of another; (2) the constitutional objection to compelling a defendant to meet charges of which the indictment gives no information."

The rule is founded in reason, as stated in the case of *State v. Elder,* 36 Wash. 482, 78 Pac. 1023:

> "The defendant comes to the trial prepared to meet only the crime for which he is accused and he cannot, from the nature of things, be prepared to defend against other crimes that may be charged against him. Moreover, it is not the policy of the law to convict a man of one crime by showing that he has at some time been guilty of another."

In *State v. Saunders,* 14 Ore. 309, are to be found the following excerpts:

> "It seems to me that this distinction is very properly made, conceding that an ordinary witness may be interrogated upon his cross examination as to whether he has not committed other offenses that cannot affect him beyond his credit in the particular case, unless it expose him to prosecution, and then he can claim his privilege. But as regards the party accused, such examination operates as a two-edged sword; it would not only impair his credit as a witness, but create a strong prejudice in the minds of the jury against him, and be a material aid towards convicting him. Unless, therefore, a defendant in a criminal prosecution is 'pure as the icicle which hangs on Diana's temple,' he had better keep off the witness stand, if the prosecution is at liberty to ransack his past life. Place a person on trial upon a criminal charge, and allow the prosecution to show by him that he has before been implicated in similar affairs—no matter what explanation of them he attempts to make—it will be more damaging evidence against him and conduce more to his conviction than direct testimony of his guilt in the particular case. Every lawyer who has had any par-

ticular experience in criminal trials knows this; knows that juries are inclined to act from impulse, and to convict parties accused upon general principles. An ordinary juror is not liable to care about such a party's guilt or innocence in the particular case, if they think him a scapegrace or vagabond. That is human nature. The judge might demurely and dignifiedly tell them that they must disregard the evidence, except so far as it tended to impeach the testimony of the party; but what good would that do? And it is not all improbable that he himself would imbibe some of the prejudice which proof of the character referred to is liable to engender. Such a practice would necessarily prevent the party accused from ever offering himself as a witness, which would leave the jury to conjecture and speculate why he pursued such a course; and often, very probably, they would draw an unfavorable inference from the circumstance."

* * * * * *

"If he were shown to be a person who had been guilty of similar acts, whose history was marked by a career of crime, and who had been a constant violator of the law, would it not render it more probable that he was guilty in the particular case?"

In the case of *State v. Baker,* 23 Ore. 442, it is stated:

"The general rule is unquestioned that evidence of a distinct crime unconnected with that laid in the indictment, cannot be given in evidence against the prisoner. Such evidence tends to mislead the jury, creates a prejudice against the prisoner, and requires him to answer a charge for the defense of which he is not supposed to have made preparation. And while, as Lord Campbell says, 'it would be evidence to prove that the prisoner is a very bad man,

> and likely to commit such an offense' (*Reg. v. Oddy,* 5 Cox C. C. 210), under no enlightened system of jurisprudence can a person be convicted of one crime on proof that he has committed another. It is of the utmost importance to a defendant that the facts given in evidence by the prosecution shall consist exclusively of the transaction which forms the subject of the indictment, and which he has come prepared to answer."

There are, of course, exceptions to this rule, as where the commission of one offense is a circumstance tending to show the commission of the offense for which the defendant is on trial, but then *only* when it is essential to establish a motive or intent. Certainly the exception should not be permitted to go to the extent of sanctioning the idea that the defendant's propensity to commit crime or to commit crimes of the same sort as that charged, can be put in evidence to prove him guilty of the particular offense.

> "While there are several well recognized exceptions to the rule excluding evidence of other offenses, the rule should be strictly enforced and should not be departed from except under conditions which clearly justify such a departure."
> 16 C. J. 587.

As stated in the case of *State v. O'Donnell,* 36 Ore. 244:

> "These exceptions are carefully limited and guarded by the courts and their number should not be increased."

As stated in Wharton on Criminal Procedure, page 145:

> "The exceptions to the general rule are those of necessity and the introduction of evidence of other offenses should only be permitted when the exigency of the particular case demands it. In any loose relaxation of the rule, the danger to the accused is that under the exceptions evidence may be adduced of offenses that he has not yet been called upon to defend, to which, if fairly tried, he might be able to acquit himself."

In *People v. O'Brien,* 31 Pacific 48, it is stated:

> "While it is true that in certain cases, like forgery and embezzlement, it is permissible to introduce evidence concerning other acts of the same nature, for the purpose of establishing a guilty intention, no such rule applies in cases of this kind where the very ground upon which the prosecution relies for a conviction is that a performance of the acts mentioned in the statute constitutes a crime regardless of any fraudulent intention."

In *Chipman v. People,* 52 Pac. 677, it is stated:

> "True it is that, in a proper case, evidence of offenses other than the one charged and of a similar character, may be admitted as tending to throw light upon the intent with which the defendant did the act for which he is on trial, but in this case the intent is not important. The mere doing of the prohibited act constitutes the offense and the specific intention with which such act is done is immaterial. The admission of such evidence of other similar offenses, therefore, could not have been otherwise than prejudicial to the defendant, and we cannot say that

such incompetent evidence did not contribute to the verdict."

In *Walker v. State,* 72 S. W. 401, it is stated:

> "Wherever facts testified in regard to the case on trial are plain and certain, extraneous matter cannot be introduced under a rule in regard to system, developing the *res gestae,* or proving intent."

As stated in the case of *Gardner v. State,* 55 Tex. Crim. 400, 117 S. W. 148:

> "Where positive evidence has been introduced by the State, evidence of extraneous and contemporary crimes is not admissible."

In *Taliaferro v. United States,* 213 Fed. 25, the defendant was indicted for carrying on the business of a retail liquor dealer. The Government was permitted to introduce evidence showing that at the time of this alleged offense the defendant was also engaged in keeping a bawdy house. The Court said:

> "The question raised by the defendant's plea of 'Not guilty' was whether or not she was engaged in the business of a retail liquor dealer, or a retail malt liquor dealer, as charged in the indictment. If she was, she was guilty, whether she sold to moral or to immoral people. The reputation of her house as one of ill fame, if it had such reputation, was wholly immaterial. *Commonwealth v. Eagan,* 151 Mass. 45, 23 N. E. 494. She could not carry on the business in question without violating the law, even if her rooms were used only for strictly moral purposes; and, if they were used for immoral purposes, still she could not, on that account, be convicted of the offense charged, without the

necessary proof that she carried on the business in question. Keeping a bawdy house—a house of ill fame—is a criminal offense, one involving moral turpitude. Whether or not the defendant was guilty of that offense is immaterial on the question as to whether or not she was a retail liquor dealer without license. *Ballowe v. Commonwealth,* (Ky.) 44 S. W. 646. Ordinarily, when a defendant is being tried for one offense, it is not permissible to prove the commission of another for the purpose of securing a conviction of the first. It is easy to see how such evidence may prejudice the jury against the defendant—may, in fact, lead to her conviction of the offense with which she stands charged, because the jury may believe that she, at least, is guilty of the other offense. Especially in a case where the evidence is conflicting, as in the instant case, the defendant should not have the burden of defending against a separate charge, introduced in evidence, for which she is not indicted, and which has no tendency to legally prove the specific charge for which she is on trial. In brief, the law does not allow one crime to be proved in order to raise a probability that another has been committed. *Dyar v. United States,* 186 Fed. 614, 621, 108 C. C. A. 478, and cases there cited.

We are of the opinion that it was error to receive evidence that the defendant was the keeper of a house of ill fame—a bawdy house—when she was on trial for selling liquor without having paid the special tax."

In the case of *Marshall v. United States,* 197 Fed. 511, are found the following head notes:

"On the trial of an indictment for using the mails to defraud in conducting the business of a society named in the indictment and alleged

to be a fraudulent organization, it was error to admit testimony showing that defendant was also at the same time conducting another society of precisely the same kind by identical methods which was not mentioned in the indictment."

* * * * * *

"The rule which excludes evidence of the commission of other similar offenses by a defendant charged with crime is subject to exception only where a guilty intent must be shown as a separate element of the offense charged, to meet the presumption of accident or mistake, and the exception should not be extended."

* * * * * *

In its opinion the Court stated:

"It is urged that the testimony was admissible upon the question of intent; but it is difficult to perceive how the repetition of identical facts can have any legtimate bearing upon this question. If the evidence as to the Standard Society showed a fraudulent intent, the Government's case in that regard was established; nothing more was needed. If, on the other hand, it failed to show fraudulent intent, how was the omission supplied by duplicating the testimony under a different name? A lawful act does not become unlawful because it is repeated. If an act be shown to be illegal, it is enough. The prosecutor may safely rest on such proof; it does not add to its illegal character to show that it was repeated. If the contention of the Government be correct, the acts of the defendant in relation to the Bankers' Company constitute an offense under section 5480 and he had a right to rely upon the rule that he would not be called upon to answer accusations not found in the indictment. It is impossible to say how much of this evidence may have prejudiced the jury."

In the case of *McDonald v. United States,* 264 Fed. 733, the Court stated:

> "Evidence of other offenses is not admissible as tending to show defendant's guilty knowledge unless guilty knowledge or intent is in issue."

In the case of *Holzmacher v. United States,* 266 Fed. 979, the Court, after stating that the question of intent was in no way involved in the indictment, and that the sole question was, did the defendant use the above language, stated as follows:

> "In cases where there are eye or ear witnesses to the happening of an isolated transaction, and the sole question is whether it happened or did not happen, it is not proper or competent to permit the introduction of evidence of other remote and disconnected matters, not charged in some good count in the indictment, to prove intent, where the element of intent is not involved in the crime charged."

In the case at bar, intent, motive or knowledge were no elements of the offense. The only question before the jury was, did the defendant (1) conduct and maintain a building in which intoxicating liquor was being manufactured, and (2) did he manufacture intoxicating liquor? Upon that point there was positive testimony of a self-confessed accomplice. If the jury believed his testimony, as it could have done without any corroboration, it would have been warranted in finding a verdict of guilt, unaided by the proof of the commission of other offenses, which naturally prejudiced the defendant in the minds of the jury. Can it be seriously argued that the proof

of the offense alleged to have been committed on June 28, 1920, had any tendency to prove the commission of the offense alleged to have been committed on August 4, 1920, and for which latter offense only he was on trial? The only possible excuse for the use of this highly prejudicial testimony was to show the character, or the disposition, or manner of life of the defendant as to make him likely to commit the crime charged, and this under the rules above referred to has no place in our system of criminal procedure. Surely the defendant was entitled to be tried upon competent evidence, and then only for the offense for which he was on trial.

As stated in the case of *Boyd v. United States,* 142 U. S. 450:

> "This evidence was collateral to the issue to be tried. No notice was given by the indictment of the purpose of the government to introduce proof of them. They afforded no legal presumption or inference as to the particular crime charged. Those robberies may have been committed by the defendants in March, and yet they may have been innocent of the murder of Dansby in April. Proof of them only tended to prejudice the defendants with the jurors, to draw their minds away from the real issue, and to produce the impression that they were wretches whose lives were of no value to the community, and who were not entitled to the full benefit of the rules prescribed by law for the trial of human beings charged with crime involving the punishment of death. Upon a careful scrutiny of the record, we are con-

> strained to hold that, in at least the particulars to which we have adverted, those rules were not observed at the trial below. However depraved in character, and however full of crime their past lives may have been, the defendants were entitled to be tried upon competent evidence, and only for the offense charged."

This transaction of June 28th, 1920, was of an entirely different nature from that for which the defendant was on trial except as both may be classified generally as prohibition violations. The transaction of August 4, 1920, was for maintaining a nuisance and for manufacturing liquor; that of June 28, 1920, was for possessing and transporting intoxicating liquor. The defendant was only on trial upon the former charge and proof of that offense certainly could in no wise be established by proof of the latter offense. A different situation might exist if the government had been required to prove a specific intent or motive, but such was not the case. No such burden was placed upon the government. It made out a prima facie case by positive testimony tending to prove all the necessary elements of the offense for which the defendant was on trial. It should have been content and not have sought to overwhelm him to his prejudice before the jury.

In the case of *State v. Proctor,* 8 Okla. Crim. 537, 129 Pac. 77, it is stated:

> "Where a defendant is on trial for a specific offense, evidence of unrelated offenses is not admissible unless relevant to the issue and tend-

ing to show motive or intent; and an unlawful intent is not an ingredient of the offense of unlawfully conveying intoxicating liquors."

In the case of *Day v. United States,* 220 Fed. 818, the defendant was convicted of carrying on a business of a wholesale liquor dealer without paying the special tax required by law. In making out this case the Government was allowed to show over objection, that the defendant had made sales similar in character but prior to the time covered by the indictment. The Court, in its opinion, said:

> "We are of opinion that it was error to admit this evidence, and its prejudicial effect can scarcely be doubted. It is a familiar and long-established rule that similar acts or misdeeds of the accused are inadequate against him, except where they are material in proof of some necessary element of the offense for which he is on trial. This rule is laid down by all the text-writers and in numberless decisions. An exception is found in cases where the criminality of the act depends upon the intent of the accused, and the wrongful intent must therefore be established. In such cases evidence may be given of prior misconduct of like character, for the purpose of proving the intent with which the particular act was committed. But it seems clear to us that the offense for which the defendant was indicted does not embrace the element of intention. No such element is included or implied in the language of the section which he is charged with violating, and nothing in its provisions or purpose indicates that proof of intent is necessary to warrant conviction. Moreover, it was not claimed that defendant openly engaged in, or held himself out as carrying on, the business of a wholesole liquor dealer. The

distillery with which he was connected was bonded by the brother, in whose name and for whose benefit it was ostensibly conducted.

"There was no proof of general facts and circumstances, such as usually indicate an occupation, from which the jury could find that the business was in fact carried on by defendant; and it therefore become necessary for the Government to show particular sales of such character and number as would justify a finding that he carried on the business for himself, and so came within the statutory prohibition. But it was the nature of these transactions and the circumstances attending them, whether they disclosed the defendant as acting for himself or as agent for his brother, which the jury was authorized to pass upon, and he could not be heard to say that he did not intend to be a wholesale liquor dealer, if his acts and doings warranted the inference that he was actually engaged in that business. In other words, the question of his guilt or innocence turned upon what he did, upon the deductions justified by the transactions themselves, and not at all upon his motive or intention. It follows from this, as we think, that evidence of similar transactions in the year 1909 was erroneously received. The sales made in that year did not show that defendant "carried on the business" of a dealer in 1910, and proof of such sales was not necessary or proper to show his intent respecting the sales he made in the last-named year, because intent is no part of the offense for which he was indicted. We have examined all the authorities cited by the learned counsel for the Government, and are satisfied that none of them sustains his contention. Indeed, it seems to be well settled that exception to the rule which excludes proof of prior misconduct is limited to cases in which intent is a necessary element

of the offense charged. In our judgment this is not such a case, and therefore does not come within the exception."

In the case of *Ford v. United States,* 259 Fed. 555, it is stated:

> "All of this testimony strongly suggested that the defendant was connected with this intended unlawful introduction of the wagon load of whiskey. While that would have been the same character of crime covered by this indictment for introducing the liquor found in the automobile, there was no attempt to connect the two. The danger of this kind of evidence is that it is likely to lead the jury aside from the case on trial, confuse the issues and result in a conviction for acts not included in the indictment. We think the evidence was inadmissible."

It might be argued that the Court by his instructions removed any prejudice in the minds of the jury that the introduction of this improper testimony may have created. That argument is answered by the decision of *Boyd v. U. S.* supra, wherein it is stated:

> "On a trial for murder, evidence of other crimes, such as robberies, committed by the defendants, is inadmissible; and the error of admitting such evidence is not cured by the judge's charge that defendants were not to be convicted because of the commission of such other crimes.
>
> "Where upon the trial, objection is made to evidence and exception taken to its admission, such exception is not waived by the failure to object to the charge of the Court upon such evidence."

CONCLUSION.

It must be quite clear that an error has been committed by the admission of evidence in this case contrary to the well settled law on the subject. That law, when invoked, must protect all those who come within its sphere, whether the person who invokes its protection seems to be sorely pressed by the weight of the inculpatory evidence in the case or not. It cannot be changed or altered for the purpose of securing the conviction of one who may be guilty and yet be invoked for the purpose of sheltering an innocent man. In the eye of the law all are innocent until convicted in accordance with the forms of law and by a close adherence of its rules.

The defendant, John Basich, was not so convicted. All that he expected to come prepared to answer at the trial was the indictment for maintaining a nuisance and for manufacturing liquor at Newberg on August 4, 1920. How can it otherwise be held but that the introduction of evidence of another and extraneous crime, to-wit, that of possessing and transporting liquor in Portland, on June 28, 1920, was calculated to take him by surprise, and do him manifest injustice by creating a prejudice against his general character. Such evidence tended to draw the attention of the jury away from a consideration of the real issues on trial, to fasten it upon other questions and to lead them unconsciously to render their verdict in accordance with their views on false issues rather than on the true issues on trial. Speaking of

evidence of other similar offenses, the Circuit Court of Appeals of the first Circuit in the case of *Fish v. U. S.*, 215 Fed. 545, 549, well said:

> "Evidence of this character necessitates the trial of matters collateral to the main issue, is exceedingly prejudicial, is subject to being misused and should be received, if at all, in a plain case."

Whatever may be the object of evidence as to other offenses—whether to prove motive, intent or guilty knowledge, or to show a general plan or scheme, or to prove identity, or to establish sexual intimacy and opportunity—proof of a distinct substantive crime is never admissible unless there is some logical connection between the two, from which it can be said the one tends to establish the other. Without this obvious connection, it is not only unjust to the prisoner to compel him to acquit himself of two offenses instead of one, but it is detrimental to justice to burden a trial with multiplied issues that tend to confuse and mislead the jury. The most guilty criminal may be innocent of other offenses charged against him, of which, if fairly tried, he might acquit himself. From the nature and prejudicial character of such evidence, it is obvious it should not have been received.

A man cannot be convicted of a given crime solely because he is a bad man generally or has committed other crimes for which he has not been punished. The commission of an independent offense is not proof of the commission of the crime with which the

man is charged. But such proof cannot be said to be without influence on the mind, for certainly if one is shown to be guilty of another similar crime, such showing will permit a more ready belief that the accused might have committed the one with which he is charged and will predispose the mind of a juror to believe the person guilty. Under the long-established rules of Anglo-Saxon jurisprudence in criminal trials, it is not only unjust to the prisoner to require him to defend himself against several offenses instead of one, but is also contrary to the principles of justice to burden a trial with multiplied issues that will serve to confuse and mislead the jury. It is not sufficient to say that the evidence justified the verdict, and therefore, even though the trial court erred in permitting this proof, the case is so clearly made out by other evidence and the defense so weak that the error must be harmless. *(People v. King,* supra.)

The issue of the case on trial is simply this: Did John Basich, at the time stated in the indictment, to-wit, August 4, 1920, maintain a nuisance and manufacture liquor at Newberg, Oregon? There was no element of intent or motive in the case. If he did so maintain a nuisance and manufacture the liquor at the time and place stated, he was guilty of that offense. If he did not, he was innocent. Upon that issue there was testimony of a positive character on the part of a Government witness, Bob Ugan, a self-confessed accomplice of Basich, who testified that

he had been hired by Basich to erect the building at Newberg and to manufacture the liquor thereat, and that he did so. If the jury believed his testimony it would have been warranted in finding a verdict of guilty, but the Government was not content to rely upon the testimony of this accomplice; it sought and succeeded in introducing evidence of a separate and distinct offense, alleged to have been committed by the defendant on June 28, 1920, at Portland, in possessing and transporting liquor thereat, which in itself was a subject of a separate and distinct indictment, and for which he was to stand trial upon the conclusion of this case. That evidence could not help but prejudice the defendant, making a fair trial on the charge alleged in the indictment almost impossible. It is impossible to say what the jury in this case would have done, but for the introduction of this incompetent evidence, much less is it within the province of this Court to say what they should have done.

We feel confident, therefore, that the introduction of this testimony, to which objection was strenuously urged at the trial, does not fall within the exception to the general rule which excludes testimony of other offenses, and that being so, the defendant is entitled to a reversal.

Respectfully submitted,

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